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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re: ACACIA MEDIA TECHNOLOGIES CORPORATION	Case No. 05-cv-01114 (JW) MDL No. 1665 **ROUND 3 DEFENDANTS' RESPONSE TO ACACIA'S MOTION FOR SUMMARY JUDGMENT OF INVALIDITY**

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Round 3 Defendants[1] submit this memorandum in response to Plaintiff Acacia Media Technologies Corporation's ("Acacia's") motion for summary judgment of invalidity under 35 U.S.C. § 112 against itself.[2] (D.I. 287). In short, we agree that all of the asserted claims of the patents-in-suit are invalid for at least the reasons described in Acacia's motion. However, we respectfully request that the Court delay issuing an order granting Acacia's motion until such time that it issues an order on Defendants' pending motions for summary judgment of invalidity under 35 U.S.C. § 112. (*See, e.g.*, D.I. 292, 296, 297).

As detailed in Defendants' pending motions, all of the asserted claims of the patents-in-suit are invalid under 35 U.S.C. § 112 on numerous grounds, including, *but not limited*, to those set forth in Acacia's motion for summary judgment. (D.I. 287). As the Defendants' explained the last time Acacia sought an immediate appeal on the narrowly-tailored invalidity grounds it stipulated to, the interest of judicial economy would best be served by the Court's consideration of and ruling on Defendants' pending motions before any appeal could be taken, notwithstanding Acacia's stipulation. The Court agreed with Defendants and denied Acacia the relief it sought. That is why the Court ordered the parties to agree on, and why the Court subsequently adopted, a schedule for briefing the Defendants' summary judgment motions. (D.I. 274; *see* D.I. 277, 280, 282).[3]

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[1] Round 3 Defendants are Time Warner Cable Inc. and CSC Holdings, Inc.

[2] The following additional parties join in this response: DirecTV Group, Inc.; EchoStar Satellite LLC; EchoStar Technologies Corp.; Charter Communications, Inc.; Wide Open West Ohio LLC; Armstrong Group; Massilon Cable TV, Inc.; East Cleveland Cable TV and Communications LLC; Mid-Continent Media, Inc.; Cannon Valley Communications, Inc.; US Cable Holdings, LP; Arvig Communications Systems; Sjoberg's Cablevision, Inc.; Loretel Cablevision, Inc.; NPG Cable, Inc.; Block Communications, Inc.; Savage Communications, Inc.; Cable One, Inc.; Mediacom Communications Corporation; Bresnan Communications; Cequel III Communications I, LLC (dba Cebridge Connections); Comcast Cable Communications, LLC; Insight Communications, Inc.; Coxcom, Inc.; Hospitality Network, Inc.; and CableAmerica Corp.

As described in Defendants' motion for a continuance (D.I. 304), once Acacia saw the list of Defendants' motions and came to appreciate the magnitude of the § 112 infirmities of the patents-in-suit, Acacia began desperately trying to avoid the Court's consideration of, and ruling on, those motions. Acacia filed a summary judgment motion against itself on the same limited grounds it previously agreed to stipulate to, and further insisted that the Court rule on its summary judgment motion before the Court considers Defendants' motions (and therefore refused to stipulate to a continuance) so that it can *again* argue that the Court lacks jurisdiction to consider Defendants' motions. (D.I. 307). This is the same position Acacia took in the Joint Stipulation and Case Management Statement filed on April 18, 2008 (D.I. 274), which as noted above, the Court rejected at a conference on May 9, 2008.

While, in fact, an early ruling on Acacia's motion would *not* deprive the Court of jurisdiction to decide Defendants' motions, Defendants do not want resolution of their motions delayed while the Court resolves Acacia's inevitable jurisdictional motion. Therefore, even though the Round 3 Defendants agree that the patents-in-suit are invalid for the reasons described in Acacia's motion, our request that the Court postpone issuance of an order on Acacia's motion until such time as this Court issues an order on Defendants' pending § 112 motions should be granted.

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[3] Indeed as reflected in the Joint Case Management Statement filed on February 29, 2008, Acacia itself initially agreed that the Court should decide all of the § 112 motions raised on summary judgment. (D.I. 267).

Dated: September 29, 2008

Respectfully Submitted,

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